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No. 86-1733

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1987

FOUNDING CHURCH OF SCIENTOLOGY OF WASHINGTON, D.C., PETITIONER

v.

DIRECTOR, FEDERAL BUREAU OF INVESTIGATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the courts below, in determining that L. Ron Hubbard was petitioner's managing agent for purposes of the federal discovery rules, violated the religion clauses of the First Amendment.

2. Whether the court of appeals correctly applied Fed. R. Civ. P. 37(d) in holding that the district court did not abuse its discretion in dismissing petitioner's action as a sanction for its willful failure to comply with a discovery order.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 12a-35a) is reported at 802 F.2d 1448. The orders of the district court (Pet. App. 5a-11a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 26, 1986. A petition for rehearing was denied on December 30, 1986 (Pet. App. 36a-38a). On March 27, 1987, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including April 29, 1987, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner and related entities filed this action in 1978, alleging violations of their rights under the First,

Fourth, and Ninth Amendments to the Constitution.[1] They sought the following relief: (1) compensatory and punitive damages under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346, 2671 *et seq.*; (2) injunctive relief to prevent respondents from conducting law enforcement investigative activities against the Church of Scientology (the Church) and its individual members; (3) further injunctive relief to destroy false information allegedly obtained by respondents and placed in government records; and (4) a declaratory judgment that respondents' activities violated the Constitution and various statutes. In 1978, the district court dismissed the damage claims for failure to exhaust administrative remedies under the FTCA, and it dismissed the injunctive claim premised on religiously-based discrimination for failure to pursue the exclusive remedy available under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* The court allowed the remainder of the action to proceed, and it granted provisional class certification to all Scientology Churches and Missions. Pet. App. 13a-15a.

During the discovery phase of this action, several high-ranking members of the Church stipulated in the context of a criminal case in which they were defendants, *United States* v. *Mary Sue Hubbard*, Crim. No. 78-401 (D.D.C.), that the Church had conducted a concerted campaign of criminal activity against various federal entities and officials, particularly the Internal Revenue Service. The

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[1] In addition to suing the United States, petitioner sued the Director of the Federal Bureau of Investigation, the Attorney General of the United States, the Director of the Central Intelligence Agency, the Secretary of the Treasury, the Chief of the United States National Central Bureau of the International Criminal Police Organization, the Director of the National Security Agency, the Secretary of the Army, and the Postmaster General. All were named solely in their official capacities. Pet. App. 14a n.1. These respondents are referred to collectively as the "government."

criminal activity against the government included the theft of government documents for use in cases against the United States, wiretapping, infiltration, perjury, and falsification of government identification cards. In light of this admitted criminal activity, the government sought to amend its answer to include a defense of "unclean hands." The magistrate, affirmed by the district court, ruled that the defense could be raised and that respondents could conduct discovery concerning that defense. Pet. App. 15a.

In August 1984, the government noticed the deposition of L. Ron Hubbard, founder of the Church of Scientology, in his capacity "as an officer, director, or managing agent" of the Church. When Hubbard failed to appear for the scheduled deposition, the government moved to compel his appearance or, in the alternative, to dismiss the case. The district court ordered the government to renotice Hubbard's deposition and to make a factual proffer explaining why Hubbard's deposition was necessary. Pet. App. 16a.

In compliance with the court's order, the government renoticed Hubbard's deposition and submitted the requested proffer. Hubbard again failed to appear, and the government renewed its motion to compel or to dismiss. Petitioner submitted various declarations by Church officials, who denied Hubbard's status as managing agent and claimed that they did not know how to contact him. The government responded with evidence to support Hubbard's status as managing agent. The court granted the government's motion and ordered Hubbard to appear for a deposition, limited to an examination of his relationship to the Church. In reaching its decision, the court specifically found (Pet. App. 6a) that there was "ample evidence in the record" that Hubbard has been petitioner's managing agent in recent years and "a dearth of support for the proposition that his role in the Church of Scientology has substantially changed"; that the government

had made "at least a prima facie showing" that Hubbard was the managing agent of the Church at the time his deposition was noticed; and that Hubbard was "uniquely situated to provide information bearing on [the government's] allegation that [petitioner] engaged in unclean hands conduct orchestrated by Hubbard during the years at issue in this lawsuit. His testimony is essential." In granting the government's motion, the court warned that Hubbard's failure to appear would result in dismissal of the action (*id.* at 6a-7a). The court denied petitioner's motion for reconsideration (*id.* at 8a-10a), and when Hubbard failed to appear for the "limited-purpose deposition," it dismissed the case with prejudice (*id.* at 11a, 17a). The court subsequently denied petitioner's motion to vacate its dismissal order (*id.* at 17a).

2. The court of appeals affirmed (Pet. App. 12a-35a). It ruled (*id.* at 19a), first, that there is "no doubt" that the Church of Scientology is the type of organization that can be deposed through an adverse party's designation of a managing agent. In analyzing whether the government made a prima facie showing that Hubbard was the managing agent of the Church,[2] the court cited the "uncontested" evidence that, although Hubbard resigned from his official position as Executive Director of the Church in 1966, he remained in control of its ecclesiastical, administrative, and financial affairs (*id.* at 21a-23a & n.6). It noted, for example, that various former Church officials described how Hubbard maintained control over Church operations and how he sought to conceal that control and avoid prosecution for Church activities (*id.* at 22a-24a). The court also noted that Hubbard "was closely linked to, if not in charge of" the criminal activities about which the govern-

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[2] The court observed that, while "[t]he law concerning who may properly be designated as a managing agent is sketchy" (Pet. App. 19a (footnote omitted)), the standard is a "functional one to be determined largely on a case-by-case basis" (*ibid.* (citing cases)).

ment sought to depose him (*id.* at 24a). It indicated (*id.* at 24a-25a) that the stipulation in the criminal case described a wide-ranging campaign of illegal activity against the government by all levels of the Church hierarchy, that Hubbard was named by the grand jury as an unindicted co-conspirator in the activity, and that Hubbard was head of the Guardian Office, the entity from which the conspiracy emanated. Based on its examination of the record, the court concluded that "Hubbard continued through 1984 not only as the potential leader of the Scientology organization but as the actual leader" (*id.* at 29a).

On the question whether the district court imposed the proper sanction, the court of appeals held that the dismissal order was not an abuse of discretion. It found that Hubbard's failure to appear for his deposition, despite repeated warnings, was properly construed by the district court as a willful disregard of the discovery process. Pet. App. 30a-35a.[3]

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or any other court of appeals. Review by this Court is therefore not warranted.

1. Relying on this Court's decision in *Serbian Eastern Orthodox Diocese* v. *Milivojevich*, 426 U.S. 696 (1976), petitioner argues (Pet. 7-8) that the court of appeals improperly inquired into the organization of the Church in ascertaining whether Hubbard was the managing agent. According to petitioner (Pet. 8), the court violated "cardinal principles of First Amendment jurisprudence: that

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[3] Petitioner filed a petition for rehearing en banc, raising essentially the same arguments that it raises in this Court. The court denied the petition, with no judge requesting a poll (Pet. App. 37a-38a).

courts may not adjudicate matters of internal ecclesiastical organization and belief." That claim lacks merit.

In *Serbian Eastern Orthodox Diocese*, the Court held that the Illinois Supreme Court, in setting aside a Bishop's defrockment and invalidating a related reorganization of the religion, had violated the First and Fourteenth Amendments. The critical feature of the case was that the Illinois Supreme Court was attempting to resolve a dispute *within* the Church. See 426 U.S. at 708-712, 724-725. In contrast, the courts in this case did not decide any internal dispute involving ecclesiastical law or church governance. Rather, the case involves a secular complaint brought by the Church against various government officials. The courts were simply attempting to resolve a discovery dispute[4] between the litigants. See generally *General Council on Finance & Administration, United Methodist Church* v. *California Superior Court*, 439 U.S. 1369, 1372 (1978) (Rehnquist, Circuit Justice) (noting that while "[t]here are constitutional limitations on the extent to which a civil court may inquire into and determine matters of ecclesiastical cognizance and polity in adjudicating intrachurch disputes [citing *Serbian Eastern Orthodox Diocese*,] * * * this Court never has suggested that those constraints similarly apply outside the context of such

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[4] Fed. R. Civ. P. 30(a) permits "any party * * * [to] take the testimony of any person, including a party, by deposition upon oral examination." Under Rule 32(a)(2) (emphasis added), "[t]he deposition of * * * anyone who at the time of taking the deposition was an officer, director, or *managing agent* may * * * be used by an adverse party for any purpose". Moreover, under Rule 37(d) (emphasis added), dismissal and other sanctions are authorized "[i]f a party or an officer, director or *managing agent* of a party * * * fails * * * to appear before the officer who is to take his deposition, after being served with a proper notice." As the court of appeals noted (Pet. App. 18a), the party taking discovery is free itself to designate the managing agent to be deposed, or to leave that designation to the opposing party.

intra-organization disputes"); *Ambassador College* v. *Geotzke*, 675 F.2d 662, 665 (5th Cir.) (same), cert. denied, 459 U.S. 862 (1982).

Under the position asserted by petitioner, a court must accept without question or analysis whomever a religious organization designates as the managing agent, and the court may not examine whether that designation has factual support. If this were the law, a religious body could file lawsuits and resist discovery demands with impunity simply by invoking the First Amendment. Petitioner chose to bring this lawsuit, and it must comply with the Federal Rules of Civil Procedure. See generally *Cantwell* v. *Connecticut*, 310 U.S. 296, 306 (1940) ("Nothing we have said is intended even remotely to imply that, under the cloak of religion, persons may, with impunity, commit frauds upon the public."); *United States* v. *The Freedom Church*, 613 F.2d 316, 320 (1st Cir. 1979) (summons issued by Internal Revenue Service to church pastor requiring production of records to evaluate eligibility for tax-exempt status not violation of First Amendment religion clauses); *Cooper* v. *Church of Scientology*, 92 F.R.D. 783, 786 (D. Mass. 1982) (magistrate's order of substitute service in light of Hubbard's efforts to avoid service of process not contrary to First Amendment); *Church of Scientology* v. *Siegelman*, 475 F. Supp. 950, 953 (S.D.N.Y. 1979) ("It does not follow * * * that simply because a religious organization is a party to an action that that action should be immediately categorized as a theological dispute"); *Rhinehart* v. *KIRO, Inc.*, 44 Wash. App. 707, 723 P.2d 22 (1986) (in action by religious leader and organization for defamation of character and invasion of privacy, discovery order requiring production of certain videotapes owned by religion did not violate religion clauses of First Amendment, and dismissal was appropriate sanction for noncompliance with order).

Petitioner nonetheless seizes upon the court of appeals' statement (Pet. 7, 9 (quoting Pet. App. 29a)) that Hubbard was the "spiritual" or ecclesiastical head of Scientology at the time his deposition was noticed, and it argues that the court was improperly "adjudica[ting] matters of internal ecclesiastical organization and belief" (Pet. 8). In the first place, there was no adjudication by the court on this issue, since petitioner has never denied that Hubbard was at all times the spiritual head of Scientology. The court was simply summarizing the undisputed evidence. Moreover, petitioner fails to explain why a person's role as spiritual leader can *never* be relevant as one of a number of factors in deciding whether that person is a managing agent. Finally, the court's reference to Hubbard's role as spiritual leader obviously was not critical to its conclusion that the district court had acted within its discretion, especially since the district court, in reaching its decision, had relied on Hubbard's overall dominance and had not referred specifically to his "spiritual" role (see Pet. App. 6a).[5]

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[5] Petitioner further contends (Pet. 11-16) that the court of appeals' decision violates the First Amendment because of the court's statement (Pet. App. 30a) that Hubbard had a "greater burden" to disassociate himself from the Church than would an entrepreneur who is seeking to "terminate all connections to the enterprise that he or she had founded." The court, however, did not suggest that it was applying a different legal standard to religions than to corporations. Rather, it was merely making a passing observation—not essential to its decision—that there may well be a practical difference between running a company and heading a religion. The court's careful analysis of the record (discussed on page 9 & note 6, *infra*) underscores that, in its view, the question whether someone is the managing agent of a religion must be decided based on a careful analysis of the evidence, and not based on any presumption or shortcut.

In the end, despite petitioner's attempts to portray this as a First Amendment religion case, it is really nothing more than a straightforward factual inquiry by two courts concerning a narrow discovery issue. Both courts below conducted a painstaking analysis of the record. Both found, based on extensive evidence, that Hubbard maintained control over various aspects of the Church and that there was ample justification to require him to submit to a deposition to explore the question whether he was a managing agent of the Church.[6] The findings of both courts are fully supported by the record, and there are no exceptional circumstances here warranting departure from this Court's settled practice of declining to review factual determinations in which both courts below have concurred. See, *e.g.*, *Branti* v. *Finkel*, 445 U.S. 507, 512 n.6 (1980) (citing cases).

2. Petitioner also claims (Pet. 16 (quoting Pet. App. 28a)) that the court of appeals has improperly adopted a rule that "a person may be compelled to give a deposition as an organization's managing agent if there is merely a 'possibility' that he 'might unilaterally reassert' his authority at some future time." Contrary to petitioner's contention, however, the court established no such rule.

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[6] For instance, the court of appeals noted that although "Hubbard resigned from his official position as Executive Director of Scientology Churches in 1966," the "uncontested declarations before the District Court leave little doubt about either the ecclesiastical or administrative dimensions of Hubbard's authority during the period from 1966 to 1982" (Pet. App. 21a, 22a-23a). Moreover, the court noted, "the declarations of the church officials themselves, while denying Hubbard's role, in fact implicitly confirmed that Hubbard, even after 1982, remained free at all relevant times to communicate to them whatever and whenever he wanted" (*id.* at 27a (footnote omitted)). In addition, the court observed that "the record reveals no evidence that Hubbard intended to end his relationship with Scientology, but only that he wanted, in his unfettered discretion, to determine whether and how to continue that relationship" (*id.* at 28a). Thus, the court concluded, Hubbard possessed "[u]ltimate control" until his apparent death in January 1986 (*ibid.*).

In the first place, in the passage discussed by petitioner, the court of appeals did not refer merely to an abstract possibility that Hubbard would return to power. Instead, the court cited the "undisputed possibility that Hubbard might unilaterally reassert his authority" and noted (Pet. App. 28a-29a (emphasis added) (citing cases)) that "[c]ourts have accorded managing agent status to individuals who no longer exercised authority over the actions in question (and even to individuals who no longer held any position of authority in a corporation), *so long as those individuals retained some role in the corporation or at least maintained interests consonant with rather than adverse to its interests.*" By ignoring this italicized language, petitioner has mischaracterized the court's opinion.

More fundamentally, the court did not base its decision solely on the above rationale. Rather, it observed (Pet. App. 29a) that the district court's decision "rest[ed] on even stronger ground" in that "Hubbard continued through 1984 not only as the potential leader of the Scientology organization but as the actual leader." Thus, contrary to petitioner's claim (Pet. 16-18), the court based its decision on Hubbard's continued and actual role in the Church.[7]

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[7] Petitioner errs in suggesting (Pet. 15) that the district court abused its discretion in selecting dismissal rather than a lesser sanction. As this Court noted in *National Hockey League* v. *Metropolitan Hockey Club, Inc.* 427 U.S. 639, 643 (1976), dismissal must be available to the courts not only to penalize a party for failure to comply with legitimate orders of the court "but to deter those who might be tempted to such conduct in the absence of such a deterrent." The deterrent value of the dismissal sanction is especially significant here, since the evidence establishes that petitioner was deliberately insulating Hubbard from the legal process (see Pet. App. 33a).

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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